

TOWN OF DAVIE
TOWN COUNCIL AGENDA REPORT

TO: Mayor and Councilmembers

FROM/PHONE: Bruce Taylor: 954-327-3741

PREPARED BY: Heidi Cavicchia

SUBJECT: Resolution

AFFECTED DISTRICT: Townwide

ITEM REQUEST: **Schedule for Council Meeting**

TITLE OF AGENDA ITEM: AGREEMENT - A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO SIGN AN AGREEMENT BETWEEN THE TOWN OF DAVIE AND DRAGADOS USA, INC., FOR UTILITY WORK IDENTIFIED AS I-595 ROADWAY IMPROVEMENTS PROJECT; AND PROVIDING FOR AN EFFECTIVE DATE. (tabled from June 3, 2009)

REPORT IN BRIEF: Dragados USA., Inc. has agreed to perform utility work on a project identified as "I-595 Roadway Improvements Project" pursuant to an agreement with I-595 Express, LLC which is the concessionaire under a Concession Agreement with the Florida Department of Transportation (FDOT). As such, the Town is being requested to enter into a joint agreement pursuant to Section 337.403(1)(b), Florida Statutes, for the utility work to be performed by Dragados USA., Inc. as part of the construction of this project.

PREVIOUS ACTIONS: At the June 3, 2009 meeting, Council tabled this item to the June 17, 2009.

CONCURRENCES: Town Attorney reviewed and approved (Cont. No. 1058-090407)

FISCAL IMPACT: No

Has request been budgeted? n/a

RECOMMENDATION(S): Motion to approve resolution

Attachment(s): Resolution, Agreement

RESOLUTION NO. _____

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO SIGN AN AGREEMENT BETWEEN THE TOWN OF DAVIE AND DRAGADOS USA., INC. FOR UTILITY WORK IDENTIFIED AS I-595 ROADWAY IMPROVEMENTS PROJECT; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town Council deems it to be in the best interest of the Town of Davie to approve the Utility Work by Highway Contractor Agreement between Dragados USA., Inc. and the Town of Davie; and

WHEREAS, the Town Council wishes to authorize the Mayor to execute the agreement, a copy of which is attached hereto.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA.

SECTION 1. The Mayor is hereby authorized to execute the agreement by and between Dragados USA., Inc. and the Town of Davie, a copy of which is attached hereto.

SECTION 2. The Town of Davie does hereby agree to the terms and conditions set forth in the agreement.

SECTION 3. This resolution shall take effect immediately upon its passage and adoption.

PASSED AND ADOPTED THIS _____ DAY OF _____, 2009.

MAYOR/COUNCILMEMBER
ATTEST:

TOWN CLERK

APPROVED THIS _____ DAY OF _____, 2009.

Financial Project ID:
County:
District Document No:
Utility Agency/Owner (UAO):

Federal Project ID:
State Road No.:

THIS AGREEMENT, entered into this _____ day of _____, year of _____, by and between **DRAGADOS USA, INC.**, hereinafter referred to as "**CONTRACTOR**", and **THE TOWN OF DAVIE**, a municipality, hereinafter referred to as the "**UAO**";

WITNESSETH:

WHEREAS, CONTRACTOR, pursuant to a design and construction agreement with I 595 EXPRESS, LLC, which is the concessionaire ("Concessionaire") under a Concession Agreement with the Florida Department of Transportation hereinafter referred to as "FDOT", has agreed to construct, reconstruct, or otherwise change a portion of a public road or publicly owned rail corridor, said project being identified as **I-595 ROADWAY IMPROVEMENTS PROJECT**, State Road No.: 862, hereinafter referred to as the "Project"; and

WHEREAS, the **UAO** owns certain utility facilities which are located within the limits of the Project hereinafter referred to as the "Facilities" (said term shall be deemed to include utility facilities as the same may be relocated, adjusted, installed, or placed out of service pursuant to this Agreement);

WHEREAS, the Project requires the location (vertically and/or horizontally), protection, relocation, adjustment or removal of the Facilities, or some combination thereof, hereinafter referred to as "Utility Work";

WHEREAS, CONTRACTOR and the **UAO** desire to enter into a joint agreement pursuant to Section 337.403(1)(b), Florida Statutes for the Utility Work to be accomplished by **CONTRACTOR** as part of the construction of the Project; and

WHEREAS, CONTRACTOR, pursuant to the terms and conditions hereof, will bear certain costs associated with the Utility Work;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, **CONTRACTOR** and the **UAO** hereby agree as follows:

1. Design of Utility Work

- a. **CONTRACTOR** shall prepare a final engineering design, plans, technical special provisions for the Utility Work (hereinafter referred to as the Plans Package).
- b. The Plans Package shall be in the same format as the **FDOT's** contract documents for the Project and shall be suitable for reproduction.
- c. Unless otherwise specifically directed in writing, the Plans Package shall include any and all activities and work effort required to perform the Utility Work, including, but not limited to, all clearing and grubbing, survey work, and shall include a traffic control plan.
- d. The Plans Package shall be prepared in compliance with the **FDOT's** Utility Accommodation Manual and the **FDOT's** Plans Preparation Manual in effect at the time the Plans Package is prepared, and the **FDOT's** contract documents for the Project. If the **FDOT's** Plans Preparation Manual is updated and conflicts

with the **FDOT's** Utility Accommodation Manual, the Utility Accommodation Manual shall take precedence where such conflicts exists.

- e. The technical special provisions which are a part of the Plans Package shall be prepared in accordance with the **FDOT's** guidelines on preparation of technical special provisions and shall not duplicate or deviate from the general contracting provisions of the **FDOT's** Standard Specifications for Road and Bridge Construction and any Supplemental Specifications, Special Provisions, or Developmental Specification of the **FDOT** for the Project.
- f. **CONTRACTOR** shall provide a copy of the proposed Plans Package to the **UAO**, **FDOT**, and to such other right of way users as designated by the **FDOT**, for review at the following stages of completion: 60%, 100%.
- g. In the event that the **FDOT** finds any deficiencies in the Plans Package during the reviews performed pursuant to Subparagraph f. above, the **FDOT** will notify the **CONTRACTOR** in writing of the deficiencies and the **CONTRACTOR** will correct the deficiencies and return corrected documents within the times stated in the notice.
- h. The Facilities and the Utility Work will include all utility facilities of the **UAO** which are located within the limits of the Project.
- i. The **CONTRACTOR** shall consult with all other right of way users in the preparation of the Plans Package. Any conflicts between **CONTRACTOR** and any right of way user which cannot be resolved through cooperation shall be resolved in the manner determined by the **FDOT**.
- j. Upon completion of the Utility Work, the Facilities, shall be deemed to be located on the public road or publicly owned rail corridor under and pursuant to the Utility Permit to be obtain at a later time (*Note: it is the intent of this line to allow either attachment of or separate reference to the permit*).
- k. As part of the final submittal of the Plans Package, the **UAO** shall also submit an estimate of the amount of the cost of the Utility Work that the **UAO** considers should be paid by the **UAO**, hereinafter referred to as the "**UAO** Participating Amount". The **UAO** Participating Amount shall be based on the credit to which **CONTRACTOR** is entitled, as set forth below, for any increase, as a result of the Utility Work, in the value of the new Facility as a result of the Utility Work, and for any salvage derived from the old Facility. These credits shall be determined as follows
 - (1) Increase in value credit.
 - (a) Expired Service Life. To the extent an entirely new Facility is constructed to replace an existing Facility as part of the Utility Work, **CONTRACTOR** shall be entitled to a credit for the life of the replaced Facility.
 - (b) The **CONTRACTOR** shall be entitled to a credit for the extra all costs for the extra of facilities upgrades requested by the **UAO** or the **FDOT** that may exceed the cost of the scope of the initial relocation work identified in the Plans.

- (2) Salvage Value. The **CONTRACTOR** shall receive fair salvage value credit for any salvage available to the **UAO** and resulting from the Utility Work.

The **UAO's** final submittal shall show the calculation of the **UAO** Participating Amount in detail for each of the credits required above. The **FDOT** shall review the calculations and advise the **UAO** of any objections. In the event that the parties cannot come to an agreement as to the **UAO** Participating Amount, the **FDOT's** determination of the amount shall prevail.

2. Performance of Utility Work

- a. **CONTRACTOR** shall incorporate the Utility Relocation Plans Package as part of its construction of the Project.
- b. **CONTRACTOR** shall construct the Utility Work in accordance with the principal contract documents and the Plans Package.
- c. The **UAO** shall perform at its own expense, all engineering inspection, testing, and monitoring of the Utility Work to insure that it is properly performed in accordance with the Plans Package, and will furnish the **FDOT** with daily diary records showing approved quantities and amounts for weekly, monthly, and final estimates in accordance with the format required by the **FDOT**.
- d. Except for the inspection, testing, monitoring and reporting to be performed by the **UAO** in accordance with Subparagraph 2. c., the **UAO** shall not be responsible to provide contract administration for the Project.
- e. The **UAO** shall fully cooperate with **CONTRACTOR** in all matters relating to the performance of the Utility Work.
- f. The **CONTRACTOR** shall have full authority over the Project and the **UAO** shall be responsible for coordinating and cooperating with **CONTRACTOR**

3. Cost of Utility Work

- a. Except as otherwise provided in paragraph 1.k. hereinabove, **CONTRACTOR** shall be responsible for all costs of the Utility Work and all costs associated with any adjustments or changes to the Utility Work determined by **CONTRACTOR** to be necessary, including, but not limited to the cost of changing the Plans Package and any increase in the cost of performing the Utility Work, and the **UAO** shall be responsible for all cost and delays caused by such adjustments or changes to the extent they are attributable to the **UAO** pursuant to Subparagraph 4.a.

4. Claims Against UAO

The **UAO** shall be responsible for all direct costs, including but not limited to costs resulting from claims asserted by third parties against **CONTRACTOR**, and field office overhead, loss of profit and loss of productivity, and for any and all legal costs to the extent incurred as a result of any delays to **CONTRACTOR** or its subcontractors caused

by any failure of the UAO to properly perform its obligations under this Agreement including timely performance thereof.

5. Out of Service Facilities

- a. The **UAO** acknowledges its present and continuing ownership of and responsibility for out of Service Facilities. Out of Service Facilities are those Facilities which, as a result of the Utility Work, shall no longer be in use or operation on the project
- b. The **UAO** shall take such steps to secure the Facilities, including Out of Service Facilities and otherwise make the Facilities safe in accordance with any and all applicable local, state or federal laws and regulations and in accordance with the legal duty of the **UAO** to use due care in its dealings with others. The **UAO** shall be solely responsible for gathering all information necessary to meet these obligations.
- c. The **UAO** shall keep and preserve all records relating to the Facilities, including the Out of Service Facilities, including, but not limited to, records of the location, nature of, and steps taken to safety secure the Out of Service Facilities and shall promptly respond to information requests of the **FDOT** or other permittees using or seeking use of the right of way.
- d. The **UAO** shall remove the Out of Service Facilities at the request of the **FDOT** and /or **CONTRACTOR** in the event that the **FDOT and/or CONTRACTOR** determines that removal is necessary for **FDOT's** use of the right of way or in the event that the **FDOT** determines that the use of the right of way is needed for other active utilities that cannot be otherwise accommodated in the right of way. In the event that the Out Of Service Facilities would have qualified for reimbursement only under Section 337.403 (1)(a), Florida Statutes, removal shall be at the sole cost and expense of the **UAO** and without any right of the **UAO** to object or make any claim of any nature whatsoever with regard thereto. In the event that the Out Of Service Facilities would have qualified for reimbursement for other reasons, removal of the Out Of Service Facilities shall be reimbursed by the **FDOT** as though it had not been placed out of service. Removal shall be completed within the times specified in the **FDOT's** notice to remove. In the event that the **UAO** fails to perform the removal properly within the specified time, the **CONTRACTOR** or **FDOT** may proceed to perform the removal at the **UAO's** expense pursuant to the provisions of Section 337.404 and 337.407, Florida Statutes.
- e. Except as otherwise provided in Subparagraph e. above, the **UAO** agrees that the Facilities including the Out of Service Facilities shall forever remain the legal and financial responsibility of the **UAO**. The **UAO** shall reimburse the **FDOT** for any and all costs of any nature whatsoever resulting from the presence of the Out of Service Facilities within the right of way. Said costs shall include, but shall not be limited to, charges or expenses which may result from the future need to remove the Out of Service Facilities. Nothing in this paragraph shall be interpreted to require the **UAO** to indemnify the **FDOT** for the **FDOT's** own negligence; however, it is the intent that any and all other costs and expenses of any nature be the responsibility of the **UAO**.

6. Default

- a. In the event that the **UAO** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in this Agreement, **CONTRACTOR** may exercise one or more of the following options, provided that at no time shall **CONTRACTOR** be entitled to receive double recovery of damages:
- (1) Terminate this Agreement if the breach is material and has not been cured within sixty (60) days from written notice thereof from **CONTRACTOR**.
 - (2) Pursue a claim for damages suffered by **CONTRACTOR**.
 - (3) Pursue any other remedies legally available.
 - (6) Perform any work with its own forces or through subcontractors and deduct all costs and fees, including attorneys' and consultants' fee incurred from any payments due, or that may become due to UAO under this Agreement and/or seek repayment under Section 337.403(3), Florida Statutes.
- b. Termination of this Agreement shall not relieve either party from any obligations it has pursuant to other agreements between the parties nor from any statutory obligations that either party may have with regard to the subject matter hereof.

7. Force Majeure

Neither the **UAO** nor **CONTRACTOR** shall be liable to the other for any failure to perform under this Agreement to the extent such performance is prevented by an act of God, war, riots, natural catastrophe, or other event beyond the control of the non-performing party and which could not have been avoided or overcome by the exercise of due diligence; provided that the party claiming the excuse from performance has (a) promptly notified the other party of the occurrence and its estimated duration, (b) promptly remedied or mitigated the effect of the occurrence to the extent possible, and (c) resumed performance as soon as possible.

8. Indemnification

Subject to the sovereign immunity provisions in F.S. § 768.28, the **UAO** shall indemnify, defend, and hold the **CONTRACTOR** and all of its officers, agents, and employees, subcontractors harmless from and against any claim, loss, damage, cost, charge, or expense arising out of any acts, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement or the Utility Work, whether to any person or property except that neither the **UAO**, its agents, employees, or its contractors will be liable under this section for damages arising out of the injury or damage to persons or property exclusively caused by or resulting from the negligence of the **CONTRACTOR** or any of its officers, agents, or employees during the performance of this Agreement.

The **UAO's** obligation to indemnify, hold harmless and defend **CONTRACTOR** shall arise fourteen (14) days after receipt by the **UAO** of **CONTRACTOR's** notice of claim for indemnification to the **UAO**. At **CONTRACTOR's** option, and in connection with the **UAO's** indemnity obligations set forth herein, the **UAO** shall participate, support, cooperate and join the **CONTRACTOR** in the defense, negotiations and/or settlement of any claim or suit arising from any matter for which the **UAO** is obligated to indemnify

CONTRACTOR hereunder. The notice of claim for indemnification shall be served by certified mail. The **UAO's** obligation to defend, hold harmless and indemnify within fourteen (14) days of such notice shall not be excused because of the **UAO's** inability to evaluate its liability or even if the **UAO** determines that the **UAO** is not liable or determines that **CONTRACTOR** is solely negligent, unless there is a final and binding adjudication or final judgment, from a court of competent jurisdiction, finding that the **CONTRACTOR** was solely negligent for the claim. The **UAO** shall be liable for any and all costs and fees incurred by **CONTRACTOR** in seeking enforcement of the **UAO's** obligations hereunder. No delay by **CONTRACTOR** in notifying the **UAO** of a claim shall excuse, diminish or release **UAO's** indemnity, defense and hold harmless obligations as set forth herein.

9. Miscellaneous

- a. Time is of essence in the performance of all obligations under this Agreement.
- b. The Facilities shall at all times remain the property of and be properly protected and maintained by the **UAO** in accordance with the current Utility Accommodation Manual in effect at the time the Plans Package is prepared and the current utility permit for the Facilities is issued; provided, however, that the **UAO** shall not be obligated to protect or maintain any of the Facilities to the extent **CONTRACTOR** has the obligation as part of the Utility Work pursuant to the **CONTRACTOR's** specifications.
- c. **CONTRACTOR** may unilaterally cancel this Agreement, and be relieved of any of its obligations hereunder, in case of refusal by the **UAO** to allow public access to all documents, papers, letters, or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by or on behalf of the **UAO** in connection with this Agreement.
- d. This Agreement constitutes the complete and final expression of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, or negotiations with respect thereto, except that the parties understand and agree that the **CONTRACTOR** has manuals and written policies and procedures which may be applicable at the time of the Project and the relocation of the Facilities.
- e. This Agreement shall be governed by the laws of the State of Florida. Any provision hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions hereof.
- f. The **UAO** shall be responsible for paying for and obtaining all permits required for the Utility Work. This includes the cost, time and submittal through final acceptance of all permits required to perform the Utility Work.

If to the _____ (**UAO**)

If to the **CONTRACTOR**

IN WITNESS THEREOF, the parties hereto have executed this Agreement effective the day and year first written.

UTILITY:

BY:(Signature) _____ **DATE:**

(Typed Name: _____)
(Typed Title: _____)

DRAGADOS-USA, INC.

By: (Signature) _____ **DATE: _**

FDOT Legal review

By: (Signature) _____ **DATE: _**
_____ District Counsel

**STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION**

BY:(Signature) _____ **DATE: _____**
(Typed Name: _____)
(Typed Title: _____)
